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ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte, RM-11429

Dear Ms. Dortch:

In recent meetings with Commission staff to discuss the Petition for Rulemaking filed by Utilities Telecom Council ("UTC") and Winchester Cator, LLC ("Winchester Cator") in the above-captioned proceeding seeking to permit terrestrial use of the 14.0-14.5 GHz on a secondary basis by critical infrastructure industry ("CII") users and for wireless backhaul ("14 GHz Petition"),¹ representatives from UTC and Winchester Cator were asked about the Commission's authority to permit the requested use without requiring the spectrum to be auctioned. As explained below, because the dominant use of the spectrum would be by CII users, the operations proposed in the 14 GHz Petition would be exempt from competitive bidding under Section 309(j)(2)'s public safety exemption.

¹ Utilities Telecom Council and Winchester Cator, LLC, *Petition for Rulemaking to Establish Rules Governing Critical Infrastructure Industry Fixed Service Operations in the 14.0-14.5 GHz Band*, RM-11429 (filed May 6, 2008).

As explained in the 14 GHz Petition, the operations proposed in the Petition would be exempt from Section 309's competitive bidding requirement.² Under Section 309(j)(2) of the Communications Act, "public safety radio services, including private internal radio services used by State and local government and non-governmental entities . . . that (i) are used to protect the safety of life, health, or property; and (ii) are not made commercially available to the public" are exempt from the Act's competitive bidding requirements.³ The Commission has analyzed this statutory provision and noted that "the statutory exemption for public safety services applies not only to traditional public safety services . . . , but also to services designated for non-commercial use by entities such as utilities, railroads, transit systems, and others that provide essential services to the public at large and that need reliable internal communications in order to prevent or respond to disasters or crises affecting their service to the public."⁴ The Commission has also made it clear that the exemption from the competitive bidding requirements applies when the dominant use of the band is for exempted public safety services,⁵ such as those proposed in the 14 GHz Petition by CII entities in this band, and that the presence of other, non-dominant commercial services in the same band does not affect the exemption.⁶

The use of the 14.0-14.5 GHz band for pre-emptible non-CII services does not change the fact that the proposed operations in the band are not subject to competitive bidding. Commercial operations for wireless backhaul and related services on a secondary, pre-emptible basis do not undermine the principal purpose of the exempt spectrum for public safety use; rather, they simply further the goals of maximizing efficient use of the spectrum. The national CII licensee proposed in the 14 GHz Petition would retain control over the 14.0-14.5 GHz

² *Id.* at 8-10, 20-21.

³ See also 47 C.F.R. §1.2102(b).

⁴ *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended*, Report and Order and Further Notice of Proposed Rulemaking, FCC 00-403, 15 FCC Rcd. 22709, 22740 (2000) ("*Competitive Bidding Order*"); see also *id.* at 22740-45; H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997) (Conference Report for the Balanced Budget Act of 1997, stating that Section 309(j)(2)'s exemption applies to the private internal radio services used by "utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments."). The Commission reiterated its analysis of Section 309(j)(2)'s exemption a few months ago. See *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Notice of Proposed Rulemaking and Order, FCC 12-148, 27 FCC Rcd 15594, 15623 n.185.

⁵ *Competitive Bidding Order*, 15 FCC Rcd at 22740 (concluding that "the public safety exemption applies only to services in which these public safety uses comprise the dominant use of the spectrum.").

⁶ *Id.* at 22741 ("[W]e find that the exemption should be evaluated in terms of its application to particular services rather than to particular classes or groups of licensees within a service.").

band and would assure that the spectrum is used in a manner that complies with the applicable regulatory and statutory requirements, including ensuring that public safety uses remain the dominant use of the spectrum.

Please direct any questions regarding this matter to the undersigned.

Respectfully,

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive, flowing style.

Henry Goldberg
Counsel to Winchester Cator, LLC